

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ADOLFO CRUZ,

Defendant-Appellant.

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UNPUBLISHED

June 8, 2010

No. 289052

Wayne Circuit Court

LC No. 08-005047-FH

Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (person under 13 years of age), one count of second-degree CSC, MCL 750.520c(1)(a) (person under 13 years of age), and one count of distributing obscene matter to children, MCL 722.675. He was sentenced to 12 to 18 years' imprisonment for his first-degree CSC convictions, 10 to 15 years' imprisonment for his second-degree CSC conviction, and to time served for his distributing obscene matter to children conviction. We affirm.

**I. BASIC FACTS**

Defendant's convictions stem from the sexual abuse of his neighbor's daughter when she was eleven or twelve years of age. Prior to trial, defendant moved to admit testimony that the victim had previously falsely accused her uncle of sexual abuse. The trial court denied the motion, ruling that defendant had failed to show that the victim's statements were definitively false.

At trial, defendant's theory of the case was that the victim was lying. Defendant testified that the sexual abuse had not occurred. The victim's mother's testimony regarding what the victim had told her was substantially consistent with the victim's version of events. The jury found defendant guilty on all counts. This appeal followed.

**II. RAPE SHIELD TESTIMONY**

Defendant first argues that trial court abused its discretion by prohibiting testimony regarding the victim's allegedly false accusation of sexual abuse against her uncle. Defendant contends that the trial court's ruling impinged his right to confront the victim by preventing

cross-examination that would have tended to impeach the victim. We disagree. We review the trial court's evidentiary decisions for an abuse of discretion. *People v Malone*, \_\_ Mich App \_\_ ; \_\_ NW2d \_\_ (2010).

Generally, evidence of a victim's past sexual conduct is inadmissible under the rape shield statute. MCL 750.520j. It may, however, be admissible under certain limited circumstances, to show evidence of the victim's past sexual conduct with the actor or if it shows the source of semen, pregnancy, or disease. *Id.* In these instances, it must also be both relevant and its inflammatory nature must not be outweighed by its probative value. *Id.* In addition, "the rape-shield statute does not preclude introduction of evidence to show that a victim has made prior false accusations of rape." *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991). This is because it is relevant to the victim's credibility and it may be used for impeachment purposes; "preclusion of such evidence would unconstitutionally abridge the defendant's right to confrontation." *Id.* at 272-273. In order for such evidence to be admissible, however, the defendant must make an offer of proof that concretely establishes that the victim made a prior false accusation of sexual abuse and must demonstrate why it is relevant. *Id.* at 273; *People v Hackett*, 421 Mich 338, 350; 365 NW2d 120 (1984).

During the preliminary examination, the victim testified on cross-examination that she had told her school counselor that her uncle had sexually abused her. She further testified that she had not lied about this incident and that she had not ever made any false accusations of sexual abuse in the past. Defendant sought to introduce this testimony at trial for impeachment purposes, arguing that it was relevant and had a high probative value given that the case would turn on credibility. The trial court denied the motion, ruling that defendant had failed to make an adequate offer of proof and that the evidence was otherwise inadmissible because its danger of unfair prejudice outweighed its probative value.

We cannot conclude that the trial court abused its discretion. Defendant's offer of proof consisted of his and his wife's allegations that the victim had told them that her accusation regarding her uncle was false. While this may be some evidence that the accusation was false, it is far from "concrete" and defendant has thus failed to substantiate his claim that the victim had lied. See *Williams*, 191 Mich App at 273. Thus, it was not error for the trial court to find that defendant failed to meet his burden of proof. We also find no error in the trial court's conclusion that the danger of unfair prejudice outweighed the evidence's probative value. While the testimony would undoubtedly have been relevant to the victim's credibility, its probative value was small given that the evidence of falsity consisted of defendant's and his wife's self-serving allegations. The trial court assigned the evidence little weight and determined that the potential for this evidence to unfairly confuse, mislead, and inflame the passions of the jury far outweighed its probative value. See MRE 403. The trial court did not err by prohibiting the testimony.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next contends that his trial counsel was ineffective for eliciting hearsay testimony from the victim's mother.<sup>1</sup> We disagree. Because defendant did not raise this issue below, our review is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To prevail on his claim, defendant must show that "counsel's performance fell below an objective standard of reasonableness under professional norms" and that but for counsel's performance, the outcome of the trial would have been different. *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009). In doing so, defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rice*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

Here, defendant asserts that counsel's decision to elicit testimony from the victim's mother regarding what the victim told her bolstered the victim's credibility and constituted ineffective assistance. A review of the record demonstrates that the victim's mother's testimony of what her daughter told her was largely consistent with the victim's testimony of the events. Because defendant's theory of the case was that the victim was lying, it is obvious that counsel pursued this line of questioning in order to show that the victim's testimony was false. That this strategy may have backfired by bolstering the victim's credibility is irrelevant. We will not assess counsel's performance with the benefit of hindsight. *People v Hill*, 257 Mich App 126, 139; 667 NW2d 78 (2003). Thus, defendant has not overcome the presumption that counsel's performance constituted sound trial strategy and was otherwise reasonable. We further note that defendant has not shown that but for this alleged error that the outcome of the proceedings would have been different. The victim's mother's testimony, although not admitted for the truth of the matter, was largely cumulative of the victim's testimony. In other words, the victim's testimony was going to be presented to the jury regardless of the mother's testimony. Defendant's claim of ineffective assistance fails.

### IV. CUMULATIVE ERROR

Defendant also contends that these cumulative errors—the trial court's decision to prohibit the rape shield testimony and to permit defense counsel to elicit alleged hearsay testimony—deprived defendant of a fair trial. We cannot agree. We review claims of cumulative error to determine whether the alleged errors, combined, deprived defendant of a fair trial. *Hill*, 257 Mich App at 152.

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<sup>1</sup> We note that defendant's argument is actually two-pronged. He first argues that the trial court erred in admitting hearsay testimony over the prosecutor's objection and, second, that defense counsel's decision to elicit hearsay testimony on cross-examination constituted ineffective assistance. We do not address the substance of defendant's first argument however because it was defense counsel who sought the admission of this allegedly inadmissible testimony. "[A] party waives the right to seek appellate review when the party's own conduct directly causes the error." *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004).

As we have already determined, the trial court did not err by prohibiting the rape shield testimony. And, even assuming that the trial court erred by permitting defense counsel to question the victim's mother regarding what the victim told her, defendant caused this alleged error and defendant is not entitled to relief on this basis. See *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004). Moreover, it is our view that this alleged error standing alone did not deprive defendant of a fair trial. As noted, the mother's testimony was cumulative of the victim's testimony and, thus, any error in its admission was harmless. Due process does not require perfect trials, rather, it simply requires fair trials. *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). Defendant is not entitled to relief on this basis.

#### V. STANDARD IV BRIEF

In his standard IV brief, defendant first argues that he was sentenced on inaccurate information and that his minimum sentence of 12 years, or 144 months, was improperly scored and outside the correct guidelines range. This argument is without merit. A trial court's decision in scoring under the sentencing guidelines is reviewed "to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supported a particular score." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (citation and quotation marks omitted). A decision for which there is any evidence in support will be upheld. *Id.* "An appellate court must affirm minimum sentences that are within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence." *Id.*; MCL 769.34(10)

At the sentencing hearing, both defendant and the prosecution agreed that the information contained in the PSIR was correct and accurate. Thus, defendant has waived any claim that the court relied on inaccurate information in determining the sentence. *People v Dobek*, 274 Mich App 58, 65; 732 NW2d 546 (2007). Defendant and the prosecution also agreed that the guidelines were incorrectly scored, reflecting an incorrect minimum guideline range of 135 to 225 months. The parties agreed that some of the offense variables were incorrectly calculated, and that upon correction, the minimum guideline range was 108 to 180 months, or nine to 15 years. The trial court agreed with this scoring and sentenced defendant to a minimum of 12 years, or 144 months' imprisonment. This sentence is within the minimum guidelines range of 108 to 180 months' imprisonment. Thus, there was no error and we must affirm the sentence as it is within the minimum guidelines range. See MCL 769.34(10).

In a related argument, defendant also contends that he is entitled to resentencing because he was not permitted to review, and challenge, the victim's statement prior to sentencing. However, there is no indication in the record that defendant did not review the victim's statement. Victim impact statements are included in the PSIR, which the trial court is required to provide to both the prosecutor and the defendant before sentencing. MCR 6.425(A)(7); MCR 6.425(B); *Morales v Parole Bd*, 260 Mich App 29, 46; 676 NW2d 221 (2003). At the sentencing hearing, defendant never alleged that he had not reviewed the report or that it was not part of the PSIR, and never objected when the trial court noted that it had reviewed the victim's impact statement the morning of the sentencing hearing, and further agreed that the PSIR was accurate. As to the veracity of the victim's statements, the victim has a statutory right to provide an impact statement for inclusion in the PSIR, MCL 780.764; *People v Cobbs*, 443 Mich 276, 284-285; 505 NW2d 208 (1993), and is free to include within the statement virtually any remarks the victim wishes, *People v Steele*, 173 Mich App 502, 504-505; 434 NW2d 175 (1988); MCL 780.763(3).

Moreover, there is no indication that the trial court relied upon her statements in scoring the guidelines. Rather, the trial court simply noted that it had reviewed her statement. The record contains other credible evidence that supports the trial court's scoring and which the parties agreed was accurate. Thus, any allegedly false information that the victim's statement may have put before the court was harmless. See *People v Daniels*, 192 Mich App 658, 675; 482 NW2d 176 (1991).

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Kurtis T. Wilder  
/s/ Elizabeth L. Gleicher